

AMENDED IN ASSEMBLY APRIL 5, 2001

CALIFORNIA LEGISLATURE—2001–02 REGULAR SESSION

**ASSEMBLY BILL**

**No. 1278**

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**Introduced by Assembly Member Wayne**

February 23, 2001

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An act to amend Section 7100 of the Health and Safety Code, to amend Sections 4123, 4609, 4659, 4711, 4766, and 4769 of, and to amend the heading of Chapter 3 (commencing with Section 4765) of Part 3 of Division 4.7 of, the Probate Code, relating to health care decisions.

LEGISLATIVE COUNSEL'S DIGEST

AB 1278, as amended, Wayne. Health care decisions.

Existing law permits a person to authorize another to make certain decisions on their behalf pursuant to a power of attorney or pursuant to an advance health care directive, as specified.

This bill would exclude health care decisions from the authority of an attorney-in-fact under a general power of attorney. The bill would revise certain provisions with respect to the following: the duties and liabilities of an agent under a power of attorney for health care with respect to funeral decisions; the definition of "capacity" with respect to a person's ability to understand, make, and communicate decisions, including health care decisions; the person who may be designated to make health care decisions as an agent or surrogate; the authority of a surrogate, rather than an agent, to make health care decisions, if both have been designated; and the use of petitions in court to honor individual health care instructions or to enforce health care decisions by an agent or surrogate.

Vote: majority. Appropriation: no. Fiscal committee: no.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 7100 of the Health and Safety Code is  
2 amended to read:  
3 7100. (a) The right to control the disposition of the remains  
4 of a deceased person, the location and conditions of interment, and  
5 arrangements for funeral goods and services to be provided, unless  
6 other directions have been given by the decedent pursuant to  
7 Section 7100.1, vests in, and the duty of disposition and the  
8 liability for the reasonable cost of disposition of the remains  
9 devolves upon, the following in the order named:  
10 (1) An agent under a power of attorney for health care governed  
11 by Division 4.7 (commencing with Section 4600) of the Probate  
12 Code. Unless the agent specifically agrees, the agent does not have  
13 a duty or liability under this section. If the agent assumes the duty  
14 under this section, the agent is liable only for the reasonable costs  
15 incurred as a result of the agent’s decisions, to the extent that the  
16 decedent’s estate or other appropriate fund is insufficient.  
17 (2) The competent surviving spouse.  
18 (3) The sole surviving competent adult child of the decedent,  
19 or if there is more than one competent adult child of the decedent,  
20 the majority of the surviving competent adult children. However,  
21 less than one-half of the surviving adult children shall be vested  
22 with the rights and duties of this section if they have used  
23 reasonable efforts to notify all other surviving competent adult  
24 children of their instructions and are not aware of any opposition  
25 to those instructions on the part of more than one-half of all  
26 surviving competent adult children.  
27 (4) The surviving competent parent or parents of the decedent.  
28 If one of the surviving competent parents is absent, the remaining  
29 competent parent shall be vested with the rights and duties of this  
30 section after reasonable efforts have been unsuccessful in locating  
31 the absent surviving competent parent.  
32 (5) The surviving competent adult person or persons  
33 respectively in the next degrees of kindred. If there is more than  
34 one surviving competent adult person of the same degree of  
35 kindred, the majority of those persons. Less than the majority of



1 surviving competent adult persons of the same degree of kindred  
2 shall be vested with the rights and duties of this section if those  
3 persons have used reasonable efforts to notify all other surviving  
4 competent adult persons of the same degree of kindred of their  
5 instructions and are not aware of any opposition to those  
6 instructions on the part of one-half or more of all surviving  
7 competent adult persons of the same degree of kindred.

8 (6) The public administrator when the deceased has sufficient  
9 assets.

10 (b) (1) If any person to whom the right of control has vested  
11 pursuant to subdivision (a) has been charged with first or second  
12 degree murder or voluntary manslaughter in connection with the  
13 decedent's death and those charges are known to the funeral  
14 director or cemetery authority, the right of control is relinquished  
15 and passed on to the next of kin in accordance with subdivision (a).

16 (2) If the charges against the person are dropped, or if the  
17 person is acquitted of the charges, the right of control is returned  
18 to the person.

19 (3) Notwithstanding this subdivision, no person who has been  
20 charged with first or second degree murder or voluntary  
21 manslaughter in connection with the decedent's death to whom the  
22 right of control has not been returned pursuant to paragraph (2)  
23 shall have any right to control disposition pursuant to subdivision  
24 (a) which shall be applied, to the extent the funeral director or  
25 cemetery authority know about the charges, as if that person did  
26 not exist.

27 (c) A funeral director or cemetery authority shall have  
28 complete authority to control the disposition of the remains, and  
29 to proceed under this chapter to recover usual and customary  
30 charges for the disposition, when both of the following apply:

31 (1) Either of the following applies:

32 (A) The funeral director or cemetery authority has knowledge  
33 that none of the persons described in paragraphs (1) to (5),  
34 inclusive, of subdivision (a) exists.

35 (B) None of the persons described in paragraphs (1) to (5),  
36 inclusive, of subdivision (a) can be found after reasonable inquiry,  
37 or contacted by reasonable means.

38 (2) The public administrator fails to assume responsibility for  
39 disposition of the remains within seven days after having been



1 given written notice of the facts. Written notice may be delivered  
2 by hand, U.S. mail, facsimile transmission, or telegraph.

3 (d) The liability for the reasonable cost of final disposition  
4 devolves jointly and severally upon all kin of the decedent in the  
5 same degree of kindred and upon the estate of the decedent.  
6 However, if a person accepts the gift of an entire body under  
7 subdivision (a) of Section 7155.5, that person, subject to the terms  
8 of the gift, shall be liable for the reasonable cost of final disposition  
9 of the decedent.

10 (e) This section shall be administered and construed to the end  
11 that the expressed instructions of the decedent or the person  
12 entitled to control the disposition shall be faithfully and promptly  
13 performed.

14 (f) A funeral director or cemetery authority shall not be liable  
15 to any person or persons for carrying out the instructions of the  
16 decedent or the person entitled to control the disposition.

17 (g) For purposes of this section, “adult” means an individual  
18 who has attained 18 years of age, “child” means a natural or  
19 adopted child of the decedent, and “competent” means an  
20 individual who has not been declared incompetent by a court of  
21 law or who has been declared competent by a court of law  
22 following a declaration of incompetence.

23 SEC. 2. Section 4123 of the Probate Code is amended to read:

24 4123. (a) In a power of attorney under this division, a  
25 principal may grant authority to an attorney-in-fact to act on the  
26 principal’s behalf with respect to all lawful subjects and purposes  
27 or with respect to one or more express subjects or purposes. The  
28 attorney-in-fact may be granted authority with regard to the  
29 principal’s property, personal care, or any other matter.

30 (b) With regard to property matters, a power of attorney may  
31 grant authority to make decisions concerning all or part of the  
32 principal’s real and personal property, whether owned by the  
33 principal at the time of the execution of the power of attorney or  
34 thereafter acquired or whether located in this state or elsewhere,  
35 without the need for a description of each item or parcel of  
36 property.

37 (c) With regard to personal care, a power of attorney may grant  
38 authority to make decisions relating to the personal care of the  
39 principal, including, but not limited to, determining where the  
40 principal will live, providing meals, hiring household employees,



1 providing transportation, handling mail, and arranging recreation  
2 and entertainment.

3 SEC. 3. Section 4609 of the Probate Code is amended to read:  
4 4609. “Capacity” means a person’s ability to understand the  
5 nature and consequences of a decision and to make and  
6 communicate a decision, and includes in the case of proposed  
7 health care, the ability to understand its significant benefits, risks,  
8 and alternatives.

9 SEC. 4. Section 4659 of the Probate Code is amended to read:  
10 4659. (a) Except as provided in subdivision (b), none of the  
11 following persons may make health care decisions as an agent  
12 under a power of attorney for health care or a surrogate under this  
13 division:

14 (1) The supervising health care provider or an employee of the  
15 health care institution where the patient is receiving care.

16 (2) An operator or employee of a community care facility or  
17 residential care facility where the patient is receiving care.

18 (b) The prohibition in subdivision (a) does not apply to the  
19 following persons:

20 (1) An employee, other than the supervising health care  
21 provider, who is related to the patient by blood, marriage, or  
22 adoption, or is a registered domestic partner of the patient.

23 (2) An employee, other than the supervising health care  
24 provider, who is employed by the same health care institution,  
25 community care facility, or residential care facility for the elderly  
26 as the patient.

27 (c) A conservator under the Lanterman-Petris-Short Act (Part  
28 1 (commencing with Section 5000) of Division 5 of the Welfare  
29 and Institutions Code) may not be designated as an agent or  
30 surrogate to make health care decisions by the conservatee, unless  
31 all of the following are satisfied:

32 (1) The advance health care directive is otherwise valid.

33 (2) The conservatee is represented by legal counsel.

34 (3) The lawyer representing the conservatee signs a certificate  
35 stating in substance:

36  
37 “I am a lawyer authorized to practice law in the state where this  
38 advance health care directive was executed, and the principal or  
39 patient was my client at the time this advance directive was  
40 executed. I have advised my client concerning his or her rights in



1 connection with this advance directive and the applicable law and  
2 the consequences of signing or not signing this advance directive,  
3 and my client, after being so advised, has executed this advance  
4 directive.”

5

6 SEC. 5. Section 4711 of the Probate Code is amended to read:

7 ~~4711. (a) A patient may designate an adult as a surrogate to~~  
8 ~~make health care decisions by personally informing the~~  
9 ~~supervising health care provider. An oral designation of a~~  
10 ~~surrogate shall be promptly recorded in the patient’s health care~~  
11 ~~record and is effective only during the course of treatment or~~  
12 ~~illness or during the stay in the health care institution when the~~  
13 ~~surrogate designation is made.~~

14 ~~(b) Designation of a surrogate under subdivision (a) does not~~  
15 ~~revoke the designation of an agent under a power of attorney for~~  
16 ~~health care unless the patient communicates the intention to revoke~~  
17 ~~in compliance with subdivision (a) of Section 4695.~~

18 *read:*

19 4711. (a) A patient may designate an adult as a surrogate to  
20 make health care decisions by personally informing the  
21 supervising health care provider. ~~An oral~~ *The* designation of a  
22 surrogate shall be promptly recorded in the patient’s health care  
23 record ~~and~~.

24 (b) *Unless the patient specifies a shorter period, a surrogate*  
25 *designation under subdivision (a) is effective only during the*  
26 *course of treatment or illness or during the stay in the health care*  
27 *institution when the surrogate designation is made, or for 60 days,*  
28 *whichever period is shorter.*

29 (c) *The expiration of a surrogate designation under subdivision*  
30 *(b) does not affect any role the person designated under*  
31 *subdivision (a) may have in making health care decisions for the*  
32 *patient under any other law or standards of practice.*

33 (d) *If the patient has designated an agent under a power of*  
34 *attorney for health care, the surrogate designated under*  
35 *subdivision (a) has priority over the agent for the period provided*  
36 *in subdivision (b), but the designation of a surrogate does not*  
37 *revoke the designation of an agent unless the patient*  
38 *communicates the intention to revoke in compliance with*  
39 *subdivision (a) of Section 4695.*



1 SEC. 6. The heading of Chapter 3 (commencing with Section  
2 4765) of Part 3 of Division 4.7 of the Probate Code is amended to  
3 read:

4  
5 CHAPTER 3. PETITIONS AND ORDERS  
6

7 SEC. 7. Section 4766 of the Probate Code is amended to read:  
8 4766. A petition may be filed under this part for any one or  
9 more of the following purposes:

10 (a) Determining whether or not the patient has capacity to make  
11 health care decisions.

12 (b) Determining whether an advance health care directive is in  
13 effect or has terminated.

14 (c) Determining whether the acts or proposed acts of an agent  
15 or surrogate are consistent with the patient's desires as expressed  
16 in an advance health care directive or otherwise made known to the  
17 court or, where the patient's desires are unknown or unclear,  
18 whether the acts or proposed acts of the agent or surrogate are in  
19 the patient's best interest.

20 (d) Declaring that the authority of an agent or surrogate is  
21 terminated, upon a determination by the court that the agent or  
22 surrogate has made a health care decision for the patient that  
23 authorized anything illegal or upon a determination by the court  
24 of both of the following:

25 (1) The agent or surrogate has violated, has failed to perform,  
26 or is unfit to perform, the duty under an advance health care  
27 directive to act consistent with the patient's desires or, where the  
28 patient's desires are unknown or unclear, is acting (by action or  
29 inaction) in a manner that is clearly contrary to the patient's best  
30 interest.

31 (2) At the time of the determination by the court, the patient  
32 lacks the capacity to execute or to revoke an advance health care  
33 directive or disqualify a surrogate.

34 (e) Compelling a third person to honor individual health care  
35 instructions or the authority of an agent or surrogate.

36 SEC. 8. Section 4769 of the Probate Code is amended to read:

37 4769. (a) Subject to subdivision (b), at least 15 days before  
38 the time set for hearing, the petitioner shall serve notice of the time  
39 and place of the hearing, together with a copy of the petition, on  
40 the following:

- 1 (1) The agent or surrogate, if not the petitioner.
- 2 (2) The patient, if not the petitioner.
- 3 (b) In the case of a petition to compel a third person to honor
- 4 individual health care instructions or the authority of an agent or
- 5 surrogate, notice of the time and place of the hearing, together with
- 6 a copy of the petition, shall be served on the third person in the
- 7 manner provided in Chapter 4 (commencing with Section 413.10)
- 8 of Title 5 of Part 2 of the Code of Civil Procedure.

